IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1129

SUSAN COHEN, *Petitioner*

v.

CHESTERFIELD COUNTY SCHOOL BOARD AND DR. ROBERT F. KELLY, *Respondents.*

On Writ of Certiorari to the Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 474 F.2d 395 (1973). The opinion of the United States Court of Appeals for the Fourth Circuit initially affirming the judgment of the United States District Court for the Eastern District of Virginia, Richmond Division, is

still unreported but appears at page 1a of the Appendix. The decision of the United States District Court for the Eastern District of Virginia, Alexandria Division is reported at 326 F. Supp. 1159 (E.D.Va. 1971).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 14, 1972. On September 20, 1972 respondents filed their Petition for Rehearing and Suggestion for rehearing *en banc,* which Petition and Suggestion were accepted on January 2, 1973. The judgment of the United States Court of Appeals for the Fourth Circuit, *en banc,* was entered on January 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, Sec. 1

" . . . , nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS FOR REVIEW

Does a policy which requires female teachers to resign after the fifth month of pregnancy constitute an arbitrary and invidious sex classification in violation of the due process and equal protection clauses of the Fourteenth Amendment?

Did the United States Court of Appeals for the Fourth Circuit commit error in granting respondents' Petition and Suggestion for Rehearing *en banc* and in rendering judgment without requesting or permitting

petitioner the right to submit briefs and present argument on her behalf?

STATEMENT OF THE CASE

Petitioner, Susan Cohen, was employed by the School Board of Chesterfield County, Virginia, as a Senior Government teacher from September 1968 to December 1970, under standard employment contracts. (A. 13) On or about November 2, 1970, Mrs. Cohen informed the School Board that she was pregnant and her estimated due date was April 28, 1971.[1] She requested that she be given maternity leave effective April 1, 1971 and presented a letter from her gynecologist stating that she could continue working as long as she chose. (A. 21) Pursuant to the School Board's maternity leave regulations (A. 20-21),[2] Mrs. Cohen was informed by school authorities on November 6, 1970, that her request had been denied by the School Board and her employment would be terminated as of December 18, 1970. (A. 13)

On November 25, 1970, petitioner personally appeared before the School Board to request that she be allowed to teach until April 1, 1971, or at least until the end of the first semester on January 21, 1971. She presented a letter from her principal Mr. John R. Kopko recommending that she be allowed to teach until January 21, 1971 (A. 97) which was denied.

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[1] On May 2, 1971, Mrs. Cohen gave birth to a son.

[2] Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

Upon deposition, the five members of the School Board assigned varied reasons for the existence of a maternity leave policy incorporating a five month rule. Three members of the Board and the Superintendent believed that the rate of absenteeism of a teacher increases in the last four months of pregnancy. (A. 39, 44, 48, 58, 106) The Superintendent and three members felt that it would be dangerous for a pregnant woman to walk down school halls and climb steps. (A. 45, 48-49, 56, 60, 61) Three members of the School Board felt that it was not good for the students to see women whose pregnancy becomes conspicuous to others, (A. 42, 53-54, 56) including one member who stated, "because some of the kids say, my teacher swallowed a watermelon, things like that. That is not good for the school system." (A. 54)

At trial, Dr. Kelly, the Superintendent, for the first time suggested that the main reason for the maternity leave regulation is to foster "continuity of teaching" by giving the School Board advance notice to secure replacement teachers. (A. 109, 112, 113) He maintained that the students suffer when there is an interruption of the teaching process between the continuity of the teaching from one teacher to a substitute teacher. (A. 128)

SUMMARY OF ARGUMENT

Petitioner asserts that mandatory maternity leave policies discriminate on the basis of sex. In light of this Court's recent decisions in *Reed* v. *Reed,* 404 U.S. 71 (1971) and *Frontiero* v. *Richardson,* — U.S. —, 41 U.S.L.W. 4609 (May 14, 1973), these regulations should be treated as invidious discrimination—based on suspect classifications—interfering with funda-

mental rights and must be measured by some compelling state interest rather than mere rational basis. Additionally petitioner contends that these regulations are so arbitrary in light of the due process clause as to not even survive a rational basis test.

ARGUMENT

I. THE CHALLENGED MANDATORY MATERNITY LEAVE RULE MUST BE VIEWED WITH STRICT SCRUTINY AS IT CREATES "SUSPECT" OR "INVIDIOUS" CLASSIFICATIONS

A. Involuntary Discharge of a Teacher Solely Because She Is Pregnant Constitutes Sex Discrimination

The issue in this case devolves to whether adverse treatment of women based on a physical condition unique to women constitutes sex discrimination. The majority of the Fourth Circuit Court of Appeals stated that sex discrimination is "found in situations in which the sexes are in actual or potential competition" and distinguished the case at bar because "[T]he fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area." *Cohen* v. *Chesterfield County School Board,* 474 F.2d 395, 397 (1973).

The majority attempts to distinguish maternity leave from leave due to other temporary disabilities on the basis of the uniqueness of pregnancy to women. While the respondents created a maternity leave policy directed toward all female teachers who became pregnant, they maintained a general sick leave policy applicable to all other teacher absences due to physical disorders or disabilities. In the employment context, pregnancy is treated on a generic basis imposing similar requirements on all pregnant teachers regardless of their individual differences or abilities while other

disabilities are treated under sick leave on an individual basis depending on the individual teacher's ability to function in the classroom. The maternity leave policy requires advance notice of the absence and requires mandatory leave of absence; the general sick leave regulations contain neither requirement. The maternity leave policy deprives the pregnant teacher from continuing to be employed until such time as both she and her doctor deem it in her best interests to stop working. It deprives her of an opportunity to use her accrued sick leave during her absence. It requires her to remain out of work until the following school year, returning then only with permission from her doctor.

Sex discrimination has been held to exist when all or a defined class of women are subjected to disadvantaged treatment based on *stereotypical assumptions* about their sex which operate to foreclose opportunity based on individual merit. "Discrimination is not to be tolerated under the guise of physical properties possessed by one sex." *Sprogis* v. *United Air Lines, Inc.,* 444 F.2d 1194, 1198 (7th Cir. 1971). Nor is discrimination tolerable when its impact concentrates on a portion of the protected class. *Phillips* v. *Martin-Marietta Corp.,* 400 U.S. 542 (1971).

A regulation designed to restrict the employment rights of pregnant teachers can only be viewed as a regulation which restricts the employment rights of women as a sex. As stated by Judge Wisdom, dissenting in *Schattman* v. *Texas Employment Commission,* 459 F.2d 32 (5th Cir. 1972), "Female employees are the only employees . . . who become pregnant; it follows that they are provisionally dismissed from work on account of their sex . . . ." 459 F.2d at 42. Chief

Judge Brown, dissenting in *Phillips* v. *Martin-Marietta Corporation,* 416 F.2d 1257, 1259 (5th Cir. 1969), a case in which an employer who was willing to hire men with pre-school age children for certain positions, but not women, held a similar view: "Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must be a woman."

The Second Circuit, confronted with facts similar to those of the instant case observed, "Why the Board should choose, by means of an inflexible rule, to manifest particular concern with the health of a pregnant woman, but not, for example, with the health of a teacher (male or female) recuperating from a heart attack is nowhere explained." *Green* v. *Waterford Board of Education,* 473 F.2d 629 (2nd Cir., 1973).

The Sixth Circuit also facing a case involving a mandatory maternity leave of absence noted, "Here, too, we deal with a rule which is inherently based upon a classification by sex. Male teachers are not subject to pregnancy, but they are subject to many types of illnesses and disabilities." *La Fleur* v. *Cleveland Board of Education,* 465 F.2d 1184 (6th Cir., 1972). Similarly the Tenth Circuit concluded that a mandatory maternity leave "penalizes the feminine school teacher for being a woman . . . ." *Buckley* v. *Coyle Public School System,* 5 F.E.P. Cases 773, 774 (1973).

A spate of district court decisions have concurred. *Bravo* v. *Board of Education of the City of Chicago,* 345 F. Supp. 155 (N.D.Ill. 1972); *Heath* v. *Westerville Board of Education,* 345 F. Supp. 501, 505 (S.D. Ohio 1972); *Williams* v. *San Francisco Unified School Dis-*

trict, 340 F.Supp. 438, 443 (N.D. Cal. 1972); *Pocklington* v. *Duval County School Board,* 345 F. Supp. 163 (M.D. Fla. 1972); *Schattman* v. *Texas Employment Commission,* 330 F. Supp. 328 (W.D. Tex. 1971), *reversed on other grounds,* 459 F.2d 32 (5th Cir. 1972), *cert. denied,* 41 U.S.L.W. 3372 (January 8, 1973); *Garner* v. *Stephens,* Civil No. 6855 (W.D. Ky., filed December 1, 1972). In *Aiello* v. *Hansen,* No. C-72-1402 SW (N.D. Cal. filed May, 1973), the California Unemployment Insurance Code provision which exempted pregnancy-related work loss from the coverage of the state disability insurance program was found to discriminate against women.

State courts have similarly held that a mandatory maternity leave policy is discriminatory towards women teachers. See *Cedar Rapids Community School District and Cedar Rapids Board of Education* v. *Parr,* No. 97858 (Dist. Ct. of Iowa, Linn County, filed May 25, 1973); *Carruth* v. *Avila,* Civil No. 237272 (Super. Ct. Ariz., filed October 26, 1971).

The Court below erred in relying upon the reasoning that "[a]s planning precedes most pregnancies, planning for the arrangements they necessitate may go hand in hand with them. That circumstances supplies the justification for the rule that puts the starting of maternity leave . . . within the control of school officials rather than in that of each pregnant teacher." *Cohen, supra,* at 398.

Instead, the Fourth Circuit should have ruled that a state agency, consistent with constitutional requirements of due process and equal protection, may not rely upon a group stereotype to disregard individual circumstances when the physical condition is preg-

nancy while it deals with all other physical conditions on the basis of individual differences.

Petitioner asks that this Court merely recognize the premise as stated by Circuit Judge Winter in dissent, "That the [pregnancy discharge] regulation is a discrimination based on sex, we think is self-evident." *Cohen, supra,* at 400.

B. Sex-Based Classifications Should Now Be Recognized To Be "Suspect" or "Invidious"

The past one hundred years have seen decisions which have impelled women to accept a dependent, subordinate status in society. In 1873, this Court in *Bradwell* v. *Illinois,* 83 U.S. (16 Wall.) 130, ruled that the right of a woman to practice law was to be nowhere found in either the privileges and immunities clause of Article IV, Section 2 of the Constitution, nor the privileges and immunities clause of the Fourteenth Amendment. Justice Bradley, concurring with the majority, found it even unnecessary to focus upon the U.S. Constitution, relying on "divine ordinance" instead:

> Man is, or should be woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of womanhood. . . .
>
> The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. 83 U.S. (16 Wall.) at 141.

"The law of the Creator" continued to be a dominant theme in decisions justifying laws establishing sex-based classifications. See, *State* v. *Heitman,* 105 Kan. 139, 146-147, 181 P. 630, 633-634 (1919); *State* v. *Bear-cub,* 465 P.2d 252, 253 (Ore. Ct. App. 1970); *Goesaert* v. *Cleary,* 335 U.S. 464, 466 (1948). The Court below apparently subscribed to this theme in holding:

> The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area. No man-made law or regulation excludes males from those experiences, and no such laws or regulations can relieve females from all of the burdens which naturally accompany the joys and blessings of motherhood. *Cohen, supra,* at 397.

Only twenty-five years ago, this Court in *Goesaert* v. *Cleary, supra,* upheld a Michigan statute which although permitting women to serve as waitresses in taverns barred them from the more lucrative employment as bartenders. In contrast to the protective motive apparently present in *Muller* v. *Oregon,* 208 U.S. 412 (1908), the actual motivation behind the statute in *Goesaert* was said by the appellant to be "an unchivalrous desire of male bartenders to try to monopolize the calling." 335 U.S. at 467.

More recently jurists in federal and state courts have found *Goesaert* a burden and an embarrassment. See *Sail'er Inn, Inc.* v. *Kirby,* 5 Cal.3d 1, 485 P.2d 529 (1971); *Tavern & Grill Owners Ass'n* v. *Borough of Hawthorne,* 57 N.J. 180, 270 A.2d 628 (1970); *Seidenberg* v. *McSorleys' Old Ale House,* 317 F.Supp. 593 (S.D.N.Y. 1970); *Bennett* v. *Dyer's Chop House,* — F. Supp. —, 41 U.S.L.W. 2243 (N.D. Ohio, October 26, 1972).

Indeed, in *United States* v. *Dege*, 364 U.S. 51 (1960), this Court refused to rely on "ancient doctrine" concerning the status of women. The Court declared, "we . . . do not allow ourselves to be obfuscated by medieval views regarding the legal status of women," and rejected precedent from an earlier age expressing a view of womanhood "offensive to the ethos of our society." 364 U.S. at 52, 53.

In 1971, a new direction was signalled by this Court. In *Reed* v. *Reed*, 404 U.S. 71, the Court invalidated an Idaho statute that gave a preference to men over women for appointment as estate administrators. In *Reed*, this Court observed that the statute allows "different treatment [to] be accorded to the applicants on the basis of their sex: it thus establishes a classification subject to scrutiny under the Equal Protection Clause." 404 U.S. at 75. *Reed* was interpreted by courts [3] and commentators [4] as a harbinger of fundamental change in this Court's perspective with regard

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[3] See *Eslinger* v. *Thomas*, — F.2d — (4th Cir. March 28, 1973); *Brenden* v. *Independent School District*, 41 U.S. L.W. 2590 (8th Cir. April 18, 1973); *Green* v. *Waterford Board of Education*, 473 F.2d 629 (2d Cir. January 29, 1973); *Moritz* v. *Commissioner*, 469 F.2d 466 (10th Cir. 1972); *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972); *LaFleur* v. *Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972); *Williams* v. *San Francisco Unified School District*, 340 F.Supp. 438 (N.D. Cal. 1972); *Heath* v. *Westerville Board of Education*, 345 F.Supp. 501 (S.D. Ohio 1972); *Robinson* v. *Rand*, 340 F.Supp. 37 (D.Colo. 1972); *Bray* v. *Lee*, 337 F.Supp. 934 (D.Mass. 1972); *Shuff* v. *Columbus Municipal Separate School District*, 338 F.Supp. 1376 (N.D.Miss. 1972); *Reed* v. *Nebraska School Activities Ass'n*, 341 F.Supp. 258 (D.Neb. 1972); *Matter of Patricia A.*, 31 N.Y.3d 83, 335 N.Y.S.2d 33 (1972).

[4] Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv.L.Rev. 1, 34 (1972); Note, 86 Harv.L.Rev. 568, 583-88 (1973).

to sex-based classifications. It was apparent that the Court had modified the traditional distinctions between the "rational basis" and "compelling interest" equal protection tests.

Recent decisions of this Court have made it abundantly clear that rational basis scrutiny is not so deferential a standard of review as had been previously supposed. The Court has apparently moved towards a reconciliation of the two standards by posing certain fundamental inquiries applicable to "all" equal protection claims. See Gunther, The Supreme Court, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1, 17 (1972). Thus, in *Weber* v. *Aetna Casualiy & Surety Company,* 406 U.S. 164, 173 (1972), the Court declared that the "essential inquiry" in all equal protection cases is "inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" And in *Police Department* v. *Mosely,* 408 U.S. 92, 95 (1972), the Court stated: "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." See *Reed* v. *Reed, supra; Weber* v. *Aetna Casualty & Surety Company,* 406 U.S. 164 (1972); *Dunn* v. *Blumstein,* 405 U.S. 330, 335 (1972); *Bullock* v. *Carter,* 405 U.S. 134, 144 (1972).

The analysis in *Reed* led to a critically significant conclusion with respect to institutional discrimination on the basis of sex. Recognizing that the governmental interest urged in support of the Idaho statute was "not without some legitimacy," 404 U.S. at 76, the

Court nonetheless found the legislation constitutionally infirm because it provided "dissimilar treatment for men and women who are similarly situated." 404 U.S. at 77.

Accordingly sex-based classifications are now subject to "scrutiny," a measure previously used in race discrimination cases where the "compelling interest" standard was required. Previously the California Supreme Court, in *Sail'er Inn, Inc.* v. *Kirby,* 5 Cal.3d 1, 485 P.2d 529 (1971), held that:

> What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with recognized suspect classifications, is that the characteristic frequently bears no relation to ability to perform or contribute to society. . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members . . . .
>
> Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon close inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment. 5 Cal.3d at 18-20, 485 P.2d at 540-41.

On May 14, 1973, in *Frontiero* v. *Richardson,* 41 U.S. L.W. 4609, this Court recognized the inherent flaw in

governmental schemes that accord different treatment to males and females solely on the basis of their sex:

> since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, *the imposition of special disabilities upon the member of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.* . . . . And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria is that the sex characteristic frequently bears no relation to ability to perform or to contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. 41 U.S. L.W. at 4612 (emphasis added).

The judgment of the Court in *Frontiero* invalidated a fringe benefit scheme that awarded male members of the military housing allowances and medical care for their wives, regardless of dependency, but authorized benefits for female members of the military only if they in fact supported their husbands. The message of *Frontiero* is clear: persons similarly situated, whether male or female, must be accorded even-handed treatment by the law. Legislative classifications may legitimately take account of need or ability; they may not be premised on unalterable sex characteristics that bear no necessary relationship to an individual's need, ability or life situation.

The plurality opinion in *Frontiero,* delivered by Justice Brennan, declares with unmistakable clarity that

"*classifications based upon sex, like classifications based* on race, alienage or national origin, are *inherently suspect* and must therefore be subjected to close judicial scrutiny." (emphasis added) Justice Stewart, concurring in the judgment, preferred to label the discrimination "invidious." Under either standard maternity leave policies are unconstitutional.

It is well settled that legal restrictions which curtail the civil rights of a group by dint of an immediately suspect classification must be subjected to the most rigid scrutiny of the courts. *Korematsu* v. *United States,* 320 U.S. 214, 216 (1944). *See, e.g., Belling* v. *Sharpe,* 347 U.S. 497, 499 (1954); *McLaughlin* v. *Florida,* 379 U.S. 184, 186 (1964); *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967). Accordingly, such regulations may be upheld only if they are *necessary,* and *not merely rationally related* to, the accomplishment of a permissible state policy. *McLaughlin* v. *Florida,* 379 U.S. at 196. Thus, in *Frontiero,* all of the eight Justices who found the fringe benefit scheme to be unconstitutional, rejected pleas of "administrative convenience" as sufficient justification for dissimilar treatment of men and women.

It is plain that petitioner's claims, when exposed to the type of judicial review required by *Frontiero,* must prevail. The burden imposed on defendants to justify the sex-based classification must be severe.

It is difficult to reconcile governmental regulations classifying persons by the permanent class of their birth with the guiding principle of our form of government that "all men are created equal." Therefore, it has been reasoned, that sex, race, national origin, and legitimacy must all be suspect classifications. See Crozier, *Constitutionality of Discrimination Based on*

Sex, 15 B.U.L. Rev. 723, 727-28 (1935); Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution,* 5 Val. L. Rev. 281, 296-97 (1971); Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective,* 46 N.Y.U. L. Rev. 675, 738-41 (1971); Note, *Are Sex-Based Classifications Constitutionally Suspect?,* 66 Nw.U. L. Rev. 481 (1971); Note, 84 Harv. L. Rev. 1499 (1971); Note, *Fair Employment—Is Pregnancy Alone a Sufficient Reason for Dismissal of a Public Employee?,* 52 B.U. L. Rev. 196 (1972).

II. THE MANDATORY MATERNITY LEAVE RULE MUST BE VIEWED WITH STRICT SCRUTINY AS IT CONTRAVENES FUNDAMENTAL CONSTITUTIONAL OR CIVIL RIGHTS.

Where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966). A regulation which trenches upon the constitutionally protected freedom from invidious official discrimination, based upon a suspect classification, bears a heavy burden of justification and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy. *McLaughlin* v. *Florida,* 379 U.S. 184, 196 (1964). The respondent school board has contravened both petitioner's right to work at her chosen profession and her right to bear children. Petitioner contends that stringent judicial scrutiny is appropriate in this case.

Since 1884, in the holding in *Butcher's Union* v. *Crescent City,* 111 U.S. 746 (1884), the Supreme Court has declared that the right "to follow any of the common occupations of life is an inalienable right . . .

formulated in the Declaration of Independence . . . a large ingredient of the civil liberty of the citizen." This holding was affirmed and expounded upon in *Truax* v. *Raich,* 239 U.S. 33, 41 (1915).

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.

Mandatory discharge, or forced leave without pay, insures that a woman will not be an "equal competitor with her brother,"[5] for it deprives her of experience at work or training during pregnancy, and under some regulations, for a prolonged period thereafter. The "protection" afforded by a regulation denying pregnant teachers the opportunity to work is at best, superfluous, but most often, harmful. It deprives pregnant women of the protection they most need: protection of their right to work and support themselves, and in many cases, their families as well.[6]

The full impact and import of this discrimination is made most poignant by the fact that many pregnant women who are forced to leave employment while they are still capable of work, are women who live in poverty. Some are the principal providers in a family where the husband is unemployed; others are not married or are separated. A woman dismissed from a desk job because of pregnancy may be found ineligible for unemployment compensation because of her con-

[5] *Muller* v. *Oregon,* 208 U.S. 412, 422 (1908).

[6] The employment of women family heads lifts many such families out of poverty. Fact Sheet on the American Family in Poverty, Women's Bureau, U.S. Department of Labor (1970).

dition and may resort to a more strenuous job in order to provide for herself and her children. Even where the husbands are present and employed, the wives' earnings frequently are necessary to keep the family above a bare subsistence level.[7]

The adverse treatment accorded women, particularly women teachers, due to their unique childbearing capacity has been the prime obstacle to their search for equal opportunity. See *Love's Labors Lost: New Conceptions of Maternity Leaves,* 7 Harv. Civ. Rts. Civ. Libs. L. Rev. 260 (1972). Summary dismissal of, or forced, unpaid leave for pregnant women, still widespread and until very recently the common pattern,[8] continues to be rationalized as "protective." See *LaFleur* v. *Cleveland Board of Education,* 326 F. Supp. 1208 (N.D. Ohio 1971), *reversed,* 465 F.2d 1184 (6th Cir. 1972), *cert. granted,* April 23, 1973, — U.S. — (1973) (No. 72-777, October Term, 1972). Such disingenious regulations function as "built-in headwinds"[9] to women's opportunities and as flagrant

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[7] The 4.2 million married women workers whose husbands had incomes below $5,000 in 1970 almost certainly worked because of economic need. This is probably true of the 3.2 million women whose husbands had incomes between $5,000 and $7,000. The majority of the estimated 33 million women in the labor force do not have the option of working solely for personal fulfillment. Figures extracted from *Why Women Work,* Women's Bureau, Employment Standards Administration, U.S. Dept. of Labor (July 1972).

[8] See Address by Jacqueline G. Gutwillig, Chairman of the Citizens' Advisory Council on the Status of Women, at the Conference of Interstate Association of Commissions on the Status of Women, in St. Louis, June 18, 1971; *Koontz, Childbirth and Child Rearing Leave: Job-Related Benefits,* 17 N.Y.L.F. 480 (1970).

[9] *Griggs* v. *Duke Power Company,* 401 U.S. 424, 432 (1971) (impact of testing on blacks).

invasions of their right to pursue their chosen professions.

Unquestionably, as petitioner's experience exemplifies (see Plaintiff's Exhibit No. 6 (A. 21)) many women are capable of working effectively during pregnancy and require only a brief period of absence immediately before and after childbirth. See *Love's Labors Lost: New Conceptions of Maternity Leaves, supra,* at 262 n. 11; Curran, *Equal Protection of the Law: Pregnant School Teachers,* 285 New England J. Md. 336 (1971).[10]

In sum, the genre of rules in question often impose a disability upon the woman which far exceeds any disability inherent in her pregnancy. These regulations, rationalized under the guise of "benign protection", strike directly and cruelly at a fundamental constitutional and civil right . . . the right to pursue one's chosen profession free of unwarranted governmental interference.

Further, by requiring her to choose between employment and pregnancy, the mandatory leave rule trespasses upon petitioner's, and the working women's right to privacy. This alone is sufficient to invoke the more exacting standard of strict scrutiny under an equal protection analysis.

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[10] See Testimony of Andre E. Hellegers, Professor of Obstetrics—Gynecology, Professor of Physiology-Biophysics and Director of Population Research at Georgetown University, before the Federal Communications Commission, December 1, 1971. In the Matter of Petitions filed by the Equal Employment Opportunity Commission, et al., Docket No. 19143: "It is of some significance that women doctors and nurses, who are working on the obstetrical and other services at the hospital, often continue working right up to the day of delivery. This, of course, would not be so if the medical profession thought that working in pregnancy was contraindicated."

This Court has recognized the interest in the marital relationship and its important procreative function as coming within the ambit of Fourteenth Amendment protection:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. *Skinner* v. *Oklahoma ex. rel. Williamson,* 316 U.S. 535, 541 (1942).

Similarly, the Court in striking down the Virginia miscegenation statute as violative of due process, recognized the freedom to marry as "one of the vital rights essential to the orderly pursuit of happiness by free men." *Loving* v. *Virginia,* 388 U.S. 1, 5 (1967). A Connecticut law prohibiting the use of contraceptives was likewise invalidated because it interfered with "a right of privacy older than the Bill of Rights, older than our political parties, older than our school system." *Griswold* v. *Connecticut,* 381 U.S. 478, 481 (1965).

The constitutional grounding of those fundamental interests was illuminated in *Eisenstadt* v. *Baird,* 405 U.S. 438, 453 (1972), as this Court concluded:

> If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. (Emphasis original).

This Court has even more recently held that the right to privacy, founded upon the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, is broad enough to encompass a woman's deci-

sion whether or not to terminate her pregnancy. Moreover, from and after the end of the first trimester of pregnancy, a state may regulate the abortion procedure only to the extent that the regulation reasonably relates to the preservation and protection of material health. *Roe* v. *Wade*, — U.S. —, 35 L.Ed.2d 147 (1973).

III. THE MANDATORY MATERNITY LEAVE POLICY DOES NOT SERVE ANY COMPELLING GOVERNMENTAL INTEREST AND CONSTITUTES A DENIAL OF DUE PROCESS RIGHTS

The resemblance between the regulation challenged in this case and the statutes involved in *Frontiero* and *Reed* is apparent. All three purport to serve the end of administrative convenience. Yet, administrative convenience was precisely the rationale for sex-based classification held insufficient in *Frontiero* and *Reed:*

> [A]lthough efficacious administration of governmental programs is not without some importance, 'the constitution recognizes higher values than speed and efficiency.' *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972) . . . . [In] the realm of 'strict judicial scrutiny' . . . any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . . .' *Reed* v. *Reed, supra*, at 76, 77. *Frontiero, supra*, at 4613. See also *Green, supra*, at 635.

The respondents have utterly failed to provide any tenable administrative justification for the regulation,[11]

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[11] See Judge Merhige's opinion in *Cohen*, 326 F.Supp. 1159, (E.D.Va. 1971); see also Judge Winter's dissent in *Cohen*, 474 F.2d 395, 401 (4th Cir. 1973).

since they have neither produced data to support their alleged speculation that pregnant teachers would be pushed with resulting injury to the fetus and disabled from fulfilling responsibilities in fire drills, and have only erroneously speculated that absences would increase during the latter stages of pregnancy. The expert medical testimony in the present case has conclusively contradicted the respondents' speculative arguments on absenteeism. (A 25-29)

Although a school board has some degree of discretion in the termination of a teacher, their ultimate decision must be based on fact rather than fiction. In *Johnson* v. *Branch,* 364 F.2d 177, 181 (4th Cir., 1966) (en banc) the Fourth Circuit laid down a standard for assessing the discretion of a school board:

> Discretion means the exercise of judgment not biases or capriciousness. Thus it must be based on fact and supported by reasoned analysis. In testing the decision of the school board the district court must consider only the facts and logic relied upon by the board itself.

It is clear that the facts and logic relied upon by the school board herein have no basis in fact and are not supported by reasoned analysis.

The Chesterfield County School Board does not have in its rules (A. 20) any policy of mandatory leave without pay for any other condition except pregnancy. Indeed, when it is shown by competent medical evidence that a teacher is incapable of teaching due to a physical disability, her contract may be terminated under Title 22, § 217.5 of the Code of Virginia. With other temporary disabilities such as an illness, or a broken leg, a teacher is permitted to continue teaching as long as he

or she feels able and then is given sick leave with pay to the extent sick leave has been accrued by the teacher. (A. 62-64, 117-118) A pregnant woman is not given this freedom of choice. No matter when she leaves her teaching post to have her child, she cannot return to teaching until September of the following year and then only with a doctor's recommendation of fitness. (A. 119) It should be noted that the same doctor's note of fitness to teach was completely disregarded by school authorities when Mrs. Cohen asked to continue teaching until the end of her eighth month.

The respondent school board can give no reason why the time of five months was chosen instead of some other period (A. 39, 42-43, 57, 59-60). Indeed, similar maternity leave regulations discussed in other cases have exhibited a panoply of such cutoff dates at which point a pregnant teacher is compelled to discontinue her work. *See, e.g., Bravo* v. *Board of Education of the City of Chicago,* 345 F. Supp. 155 (N.D. Ill. 1972) (after four months); *Pocklington* v. *Duval County School Board,* 345 F. Supp. 163 (M.D. Fla. 1972) (after four and one-half months); *Heath* v. *Westerville Board of Education,* 345 F. Supp. 501 (S.D. Ohio) (after five months); *Williams* v. *San Francisco Unified School District,* 340 F. Supp. 438 (N.D. Cal. 1972) (after seven months).

Clearly, such regulations are arbitrarily drawn and are devoid of an elemental consistency that would infer a fair and substantial relationship between the classifications created and any compelling governmental objectives. That the Chesterfield County School Board would treat all pregnancies alike, while medical evidence and the diverse treatment issued by other school

boards establishes that no two pregnancies are alike speaks to the monumental overbreadth of such regulations. The effect of such mandatory leave dates is transparently arbitrary in its application. Consider the petitioner's request to at least continue teaching until the end of the first semester on January 21, 1971. The basis of denial was that it was impossible to make a policy to suit everyone (A. 23). Thus, the regulation at issue operated to arbitrarily deny the students the advantage of having one teacher throughout the semester, thereby disrupting a continuity of education. There are many pregnant teachers, including the petitioner, who insist as do their physicians, that they may continue teaching in order to maintain some continuity of education for their students beyond an arbitrary "threshold" date.

A teacher who is not afforded an opportunity to establish her medical fitness to continue teaching beyond the designated commencement of her compulsory maternity leave is denied her right to due process of law. *Pocklington* v. *Duval County School Board,* 345 F. Supp. 163 (1972); *Cf. Stanley* v. *Illinois,* 405 U.S. 645 (1972).

As the mandatory maternity leave provisions mandate "dissimilar treatment" for reasons akin to those reflected in the statutes before the Court in *Frontiero* and *Reed,* these provisions must be also held to violate the command of equal protection.

IV. THESE MATERNITY LEAVE RULES EVEN LACK ANY RATIONAL BASIS

Even viewed in the light of the lesser test of "rational relationship" the regulation "must be reasonable, not arbitrary, and must rest upon some ground

of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Company* v. *Virginia,* 253 U.S. 412, 415 (1920). In such cases, the basic question for determination is whether there is some ground of difference that rationally explains the different treatment accorded pregnant women and non-pregnant men under the impact of respondents' leave policies. Petitioner contends that a rule subjecting pregnant women to resignation or forced leave without pay is devoid of a "rational basis" as defined by this Court.

During discovery depositions, the following rationale for the five month maternity leave provision was advanced upon deposition by members of the school board and its superintendent: (1) increased absence from school by teachers who become pregnant (A. 39, 44, 48, 58, 106); (2) threat to the health of the pregnant teacher from pushing in the hallways and climbing stairs (A. 45, 48-49, 56, 60-61); (3) physical appearance of the teacher more than five months pregnant (A. 42, 53-54, 56). The arbitrariness of the policy can best be seen in the statement of School Board member C. C. Wells, who, when asked when a teacher should stop teaching, answered "I would say when they become very conspicuous . . . because some of the kids say my teacher swallowed a watermelon . . . ." When Superintendent Kelly was asked to sum up his interpretations of the five-month rule, he replied that his dual concerns were the questions of absenteeism and the safety of the mother (A. 65). No bases other than personal experience and opinion were able to be cited as a foundation for these reasons for the policy.

Neither the Superintendent nor any School Board member offered this "continuity in the educational program" as justification for these policies at their depositions. At trial, Superintendent Kelly altered his position by offering, for the first time, his opinion that the maternity leave provisions were grounded in a "continuity of education" hypothesis. When questioned, Kelly admitted that his "revised" testimony on the five-month rule occurred to him primarily because of the litigation as distinguished from the reason for the policy. (A. 16).

A. Administrative Convenience Is Insufficient To Uphold the Rule

At trial, Kelly maintained that the main thesis for the enactment of the maternity policy was one of administrative convenience, i.e., the need for school authorities to know "that a teacher is going to leave so that we can start looking for a qualified replacement for that teacher." (A. 109)

This right of school authorities to plan for the departure of a pregnant teacher has been raised and dismissed in other district and circuit court cases involving maternity leave.[12] While admitting that a five-month rule might simplify somewhat the determination of a cutoff date and task of locating a replacement teacher to enter the classroom, these same courts, relying on *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972), have reasoned that the fact that a rule reduces administrative workload insufficient to sustain discriminatory treatment:

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[12] *LaFleur, supra,* at p. 1188; *Williams, supra,* at p. 445; *Bravo, supra,* at 157-158; *Green, supra,* at p. 636; *Heath, supra,* at p. 506; *Robinson, supra,* at p. 37.

> Procedure by presumption is always cheaper than individual determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and the child. It therefore cannot stand.

Further support for this view rejecting administrative convenience can be found in *Reed* v. *Reed, supra* and *Frontiero* v. *Richardson, supra.*

In *Reed,* the Court held that even though the State's interest in achieving administrative efficiency "is not without some legitimacy," "[T]o give a mandatory preference to members of either sex over members of the other, merely to accomplish elimination of hearings on the merits, is to make the very kind of arbitrary legislation choice forbidden by the [Constitution]. . . ." *Reed, supra,* at 76.

B. A Mandatory Maternity Leave Rule Does Not Promote Continuity of the Educational Process

At trial, Superintendent Kelly expressed the opinion that any absence from the classroom tends to disrupt the teaching process (A. 110) and found that a "study" of elementary teachers requesting maternity leave showed that they had more absences from school during the third, fourth and fifth months compared to similar months during the previous year. (A. 111). Dr. Kelly admitted that he had no way of knowing from School Board records and that he had never inquired from medical authorities what the absentee rate might be for a pregnant teacher beyond the fifth month of pregnancy (A. 117). More importantly, all of the conjectures of the Superintendent and the School Board con-

cerning increased absenteeism, possible dangers to the health and welfare of the pregnant woman and fetus from pushing in the halls and climbing stairs, and physical dependency on her doctor were contradicted by expert medical testimony.

In upholding the maternity leave rule at issue, the Fourth Circuit indulged in the same type of speculation concerning the "uniqueness" of pregnancy versus other physical disabilities or conditions.

The majority fails to note that the element of predictability is also present in the case of a teacher suffering from a known disorder or disability that might necessitate an operation sometime in the future. Judge Winter, in his dissenting opinion, stressed that,

> the general sick leave requirements contain no requirement of notice, a mandatory beginning of sick leave or continuation of employment after notice until surgery for *any* elective surgery for *any* teacher male or female. Yet it cannot be said that the disruptive effect on the students or the burden on the school administration is any less in the case of any elective surgery than the disruption and burden occasioned by a pregnant teacher's absenting herself to deliver. Indeed, it would be greater since the pregnant teacher would have been required to give notice of her impending confinement and thus school officials would have ample time in which to find a replacement. To me, the discrimination is obvious. [*Cohen, supra,* at 401-402.]

Indeed, in the instant case, it is quite logical to assume that greater disruption was created by terminating the employment of petitioner on December 18, 1971, only one month from the end of the first semester.

Hence, the history of this litigation establishes that the "continuity of education" argument was advanced more as an afterthought than as a serious explanation for the regulation.

In *Green* v. *Waterford Board of Education, supra,* the Second Circuit considered this "continuity" rationale and reached the following conclusion:

> Continuity of instruction is surely an important value. Where a pregnant teacher provides the Board with a date certain for commencement of leave, however, that value is preserved; an arbitrary leave date set at the end of the fifth month is no more calculated to facilitate a planned and orderly transition between a teacher and a substitute than is a date fixed closer to confinement.

Moreover, this Court has recently shown a disinclination to speculate as to what unexpressed legitimate state purposes may be rationally furthered by a challenged statutory classification. See Gunther, *supra,* note 3, at 33 (discussing *James, Judicial Administrator, et al* v. *Strange,* 407 U.S. 128 (1972)). Nevertheless, no rationalization, whether offered or omitted by the respondents, can adequately camouflage the essentially unreasonable, arbitrary, and inequitable classification inherent in the regulation at issue.

The mandatory leave policy for pregnant teachers was born out of prejudice and ignorance. In a very few instances, it has been sustained as a matter of convenience. It must be viewed for what it truly is, an anachronism and nothing more.

OVERWHELMING AUTHORITY SUPPORTS PETITIONER'S POSITION

As previously cited in this brief, numerous other federal courts have already decided this question favorably to the position of the petitioner. While this court is the final arbiter of these constitutional questions, the other courts deciding this issue have been so overwhelmingly in favor of petitioner's view that she respectfully requests this court to give great weight to all these other jurists. Thus the Second, Sixth and Tenth Circuits have already decided this issue favorably to petitioner's view respectively in *Green* v. *Waterford Bd. of Ed., supra; LaFleur* v. *Cleveland Bd. of Ed., supra;* and *Buckley* v. *Coyle Public School System, supra.* Additionally district courts in the Second (New York), Fifth (Florida), Sixth (Ohio and Kentucky), Seventh (Illinois) and Ninth (California) circuits have decided this issue favorably to petitioner's view in *Monell* v. *Department of Social Services,* 4 E.P.D. 5936 (S.D.N.Y. 1972) *Pocklington, supra, Heath, supra, Garner, supra, Bravo, supra,* and *Williams, supra.* Accordingly every federal court, aside from the Fourth Circuit, has decided the issue of mandatory maternity leave for teachers favorably to petitioner's view. Indeed the majority of judges in the Fourth Circuit litigation decided the issue favorably to petitioners.[13]

At the time of the institution of this suit, state agencies and educational institutions were specifically exempted from the Act. 42 U.S.C.A. § 2000e (b); 42

[13] J. Young of the U.S. District Court in Baltimore sat by designation of the original Fourth Circuit panel and voted for petitioner. With J. Merhige and the three dissenting circuit judges that made five federal judges in favor of petitioner against the four in the majority opinion.

U.S.C.A. § 2000e-1.[14] On March 24, 1972, these exemptions were repealed by the Equal Employment Opportunity Act of 1972, P.L. 92-261 and on April 5, 1972, the Equal Employment Opportunity Commission adopted guidelines declaring that exclusion of employees "from employment . . . because of pregnancy is in *prima facie* violation of Title VII" (29 C.F.R. § 1604.10(a), and requiring employers to treat disabilities caused by pregnancy and childbirth like other temporary disabilities (29 C.F.R. § 1604.10 (b)). (See Appendix to Petitioner for Certiorari 28a-29a)

The significance of the Commission's guidelines was pointed out by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971). "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference . . . ." Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress. As this Court stated in *Frontiero, supra,* concerning Title VII and § 1 of the Equal Rights Amendment, "Thus Congress has itself concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration."

Indicative of the changes in economic and social life since the enactment of Title VII, women workers—principally blue collar workers—have successfully

[14] While public employees were specifically exempted from Title VII coverage it was assumed by Congress that the Fourteenth Amendment afforded them the same protection as private employees would receive under Title VII (40 Cong. Rec. 13169-72, May 9, 1964).

challenged laws restricting their working conditions. As the work day shortened from twelve hours to eight, and the work week from six days to five, women found that these laws, however "protective" in origin, were "protecting" them from better-paying jobs and opportunities for promotion. See, e.g., *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Ridinger* v. *General Motors Corp.*, 325 F.Supp. 1089 (S.D.Ohio 1971); *Kober* v. *Westinghouse Electric Corp.*, 325 F.Supp. 467 (W.D. Pa., 1971). To that effect, it has been held that the scope of the Title VII provision is not confined to explicit discrimination based "solely" on sex; in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. *Sprogis* v. *United Air Lines*, 444 F.2d 1194 (1971), cert. den. 92 S. Ct. 536. See also *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir., 1969), *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir., 1971).

The wide-reaching outgrowth of the court cases at issue and the promulgation of the EEOC guidelines prohibiting exclusion of employees because of pregnancy can readily be seen in the number of state courts, agencies and labor organizations that have examined the problem of maternity leave and have concluded that these policies constituted sex discrimination under the guise of protective legislation. *State Division of Human Rights* v. *Board of Education of Union Free School District No. 22*, Case Nos. CS 21025-70 et seq. (June 29, 1971); *Awadallah* v. *New Milford Board of Education*, N.J. Dept. Law and Public Safety, Sept. 29, (1971); *Blair* v. *New Milford Board of Education*, No. EO2ES-5337 (Sup. Ct. Hackensack, N.J.,

Jan. 20, 1971); *Truax* v. *Edmonds School District #15,* Dkt. # 107915, (Superior Ct. Snohomish County, Washington, August 1971); Wisconsin Administrative Code § 88.20; *Southgate Educational Association and Board of Education of Southgate Community School District,* AAA Case No. 5439-0323071 (Aug. 3, 1971); *Middletown Board of Education* (arbitrator's decision) 56 L.A. 830, 832 (1971); *Flo* v. *General Electric Company,* 195 N.Y.2d 652 (1959); *Tecumsech Products Co.* v. *Wisconsin Employment Relations Board,* 126 N.W.2d 520 (1959).

The Department of the Army in its interim changes to AR 635-120 has stated that "the officer will continue to work until the doctor or her commanding officer determines that it is in the best interest of the individual or the service that she be relieved from her duty assignment." See also *Robinson* v. *Rand,* 340 F.Supp. 37 (D. Col. 1972) and *Struck* v. *Secretary of Defense,* 460 F.2d 1372 (9th Cir. 1971) remanded by the Supreme Court on the issue of mootness. Furthermore, the Civil Service Commission has currently commissioned a panel to bring its regulations concerning maternity leave into compliance with the EEOC guidelines, *supra.*

The policy makers of governmental agencies have taken the same position. The Office of Federal Contract Compliance of the U. S. Department of Labor has issued interpretative guidelines for enforcing Executive Order 11246 which prohibits sex discrimination by employers holding federal contracts. 42 U.S.C.A. § 2000e. The Sex Discrimination Guidelines provide in part, "Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing." 41

C.F.R. § 60-20.3(g). Further interpretations of the guidelines state that the time when maternity leave shall begin . . .

> is primarily a medical decision which is not reasonable for a contractor to make in terms of a blanket policy. The time when a woman leaves before childbearing is normally a matter between the pregnant employee and her doctor. John Wilks, *Memorandum,* Dept. of Labor, Nov. 1970.

The Citizens Advisory Council on the Status of Women of the Dept. of Labor adopted the following *Statement of Principles* on October 29, 1970:

> Childbirth and complications of pregnancy are for all job-related purposes, temporary disabilities and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of an employer, union, or fraternal society. Any policies or practices of an employer or union, written or unwritten, applied to instances of temporary disability other than pregnancy, should be applied to incapacity due to pregnancy or childbirth, including policies or practices relating to leave of absence, restoration or recall to duty, and seniority.

At least 70 countries afford women paid maternity leave or comparable insurance benefits.[15] These policies are being urged throughout the labor force.[16]

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[15] "The Report of the Committee on Civil and Political Rights" to the President's Commission on the Status of Women, 196.

[16] See "Unemployment Insurance Letter No. 1097", urging states to consider unemployment insurance for maternity leave; AFL-CIO 1969 convention resolutions, UAW 1970 Convention resolutions urging a single system of statutory insurance protection against wage loss due to temporary disability, including illness, pregnancy and maternity; *Report of the Committee on Social Insurance and Taxes,* President's Commission on the Status of Women, Oct. 1963, which also urges cash maternity benefits.

While petitioner recognizes that the court is not bound by the foregoing decisions of agencies, commissions, etc., she urges that this Court find their rationale and pervasiveness throughout the work force and the differing forums as more than persuasive.

VI. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, EN BANC, VIOLATED PETITIONER'S CONSTITUTIONALLY GUARANTEED RIGHT TO DUE PROCESS.

Rule 35 of the Federal Rules of Appellate Procedure suggests that an *en banc* rehearing by a Court of Appeals will be ordered where it is (1) "necessary to secure or maintain uniformity in decisions, or (2) when the proceeding involves a question of exceptional importance." Since no contradictory decisions were to be found in the Fourth Circuit or any other circuit of the United States Courts of Appeals, it must be concluded that the Court of Appeals granted rehearing *en banc* in this matter because there were questions of "exceptional importance" involved.

Under Rule 40 of the Federal Rules of Appellate Procedure, petitioner was precluded from filing an answer to the Petition for Rehearing without a specific request to do so by the Court of Appeals. However, Rule 40 further suggests that "a Petition for Rehearing would ordinarily not be granted in the absence of such a request." Rule 40 in authorizing the use of discretion by the Court of Appeals does not sanction an abuse of that discretion.

The original appellant brief was filed more than fourteen months prior to the January 2, 1973 Order granting rehearing *en banc*. Appellate oral argument took place on January 4, 1972, over a year prior to the Court of Appeals Order reversing the lower Court.

Additionally, five of the seven judges sitting on the Fourth Circuit bench never had the benefit of any oral argument in this case. Every major federal decision covering the question of pregnant teachers' rights has been rendered subsequent to the oral argument.[17] Nevertheless, petitioner (appellant below) was not granted leave to file additional briefs or present oral argument on these cases.

In the *en banc* decision of the Fourth Circuit Court of Appeals Judge Winter in his dissent makes frequent reference to the trial record. Contrarily, Chief Judge Haynsworth, speaking for the Court, makes no such reference. Had the petitioner been granted the opportunity to file a brief in her petition for rehearing, she would have demonstrated that the decision of the Court *en banc* was not supported by the evidence at trial.

Furthermore when petitioner (appellant below) was informed of the rehearing *en banc* order she immediately sought oral argument (see p. 1a, *infra*) which was rejected by the Court of Appeals (see p. 3a, *infra*), which had apparently written its opinions prior to ordering the rehearing *en banc.*

Considering the above circumstances, it is difficult, if not impossible to conceive of a series of procedures more devoid of due process. The Court of Appeals acted solely upon respondents' Petition and Suggestion. Counsel for petitioner were not afforded the opportunity to respond. They were not allowed to incor-

[17] See *LaFleur, supra; Green, supra; Monell, supra; Pocklington, supra; Williams, supra; Bravo, supra; Heath, supra;* and *Garner, supra.* See also Public Law 92-261, 92nd Cong., H.R. 1746 (Equal Employment Op. Act of 1972), which amendment extended the coverage of Title VII to employees of state and municipal governments. (See Appendix 28a-29a in the Petition for Certiorari.)

porate recent decisions into the theory of their case or to distinguish contrary decisions. In this system of jurisprudence which extols the principles of advocacy, petitioner was denied the right to advocate. Such a denial in the face of the great significance and far reaching effect of this case, constitutes more than a mere abandonment of the reasonable bounds of judicial discretion. It is an effective denial of petitioner's due process of law.

CONCLUSION

It is respectfully submitted that for the foregoing reasons, the judgment of the United States District Court of Appeals for the Fourth Circuit rendered *en banc* January 15, 1973 should be reversed and the judgment of the United States Court of Appeals for the Fourth Circuit rendered September 20, 1972 should be reinstated.

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APPENDIX

APPENDIX

January 9, 1973

Clerk of Court
United States Court of Appeals
Post Office Building
Richmond, Virginia

RE: Cohen v. Chesterfield County School Board, et al.
No. 71-1707

Dear Sir:

I have received a copy of the Order of this Court in this matter filed on January 2, 1973, granting rehearing *en banc* and submitting the case on the briefs and tape of oral argument. I would like to protest this procedure by the Court and have you transmit my request to the Court that the Order be vacated and the Court follow the procedure outlined by the Federal Rules of Appellate Procedure.

Appellate Rule 35 indicates that rehearing *en banc* will be ordered where 1) it is necessary to secure or maintain uniformity in decisions; or 2) where a question of exceptional importance is involved. Since there are no contradictory decisions in this circuit or other United States Courts of Appeals, I do not see how the Court could grant this to secure uniformity. Accordingly, it must consider this a question of exceptional importance.

Under Appellate Rule 40, appellees were precluded from filing any answer to the petition for rehearing in this matter without a request from the Court. However, Rule 40 suggests that "A petition for rehearing will ordinarily not be granted in the absence of such a request."

I would further bring to your attention that this matter was briefed over fourteen (14) months ago, and that argument of the same was over one (1) year ago. Since the Court has precluded appellee from filing any responsive pleadings to the petition for rehearing, in violation of the

spirit of Rule 40, the Court has effectively denied appellees from arguing to the Court a number of major decisions in this area rendered within the last twelve (12) months.

If the Court truly considered this matter one of "exceptional importance" under Rule 35, then I fail to understand why they did not follow the recommended procedure under Rule 40 of allowing appellees to file a response to the petition for rehearing and, in fact, not follow the procedure of setting this matter back on the docket for rehearing.

I would accordingly request that the Court vacate its Order granting the petition for rehearing and allow the appellees to file a response under Rule 40. Then, should a petition for rehearing be awarded, the matter should thereafter be set down for argument and briefing by the parties in order that the Court may decide it on current authorities. This also would give the appellees the fair procedures to which they are entitled. I would further point out that these proceedings should not only afford appellees due process but it should afford the appearance of due process rather than the appearance of being decided behind closed doors without a chance for litigants before this Court to fairly argue their case.

Very truly yours,

PHILIP J. HIRSCHKOP

PJH:hns

CC: OLIVER W. HIXON, III ESQUIRE
SAMUEL W. HIXON, III, ESQUIRE
FREDERICK T. GRAY, ESQUIRE
Ms. CYNTHIA EDGAR GITT, Attorney at Law
JOHN MANN, ESQUIRE
DAVID RUBIN, ESQUIRE

bcc: The Honorable ROBERT R. MERHIGE, JR.

APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

January 17, 1973

Philip J. Hirschkop, Esquire
110 North Royal Street
Alexandria, Virginia 22313

No. 71-1707—Mrs. Susan Cohen v. Chesterfield County School Board, et al.

Dear Mr. Hirschkop:

Your letter dated January 9, 1973 regarding the above referenced case was received on January 15, 1973. The Court's opinion in the referenced case was received in the same mail shipment that delivered your letter. However, pursuant to your request your letter was transmitted to the Court.

Since the letter under consideration was addressed to me, I would respond to its two major points of inquiry. Firstly, I have observed that Rules 35 and 40 of the Federal Rules of Appellate Procedure provide for precisely what was done in the instant case, and the procedure followed was not unusual for like cases. Specifically, Rule 40 reads in part, "If a petition for rehearing is granted the Court may make a final disposition of the cause without reargument...."

Secondly, I wish to reassure you that your letters of June 21, 1972, July 20, 1972, August 3, 1972 and December 29, 1972, which contained numerous citations of recent decisions (as well as similar letters from all counsel), have all been forwarded to and considered by the Court. Therefore the desire of counsel to update the Court's awareness of current authorities has been substantially achieved.

I thank you for directing your letter to my attention. It is our belief that the clerk's office exists to serve not only the Bench but the Bar as well. To that end we will ever be pleased to be of whatever service we may.

Sincerely,

/s/ William K. Slate, II
William K. Slate, II

WKS/fs
cc: Oliver Rudy, Esquire
Samuel W. Hixon, III, Esquire
Frederick T. Gray, Esquire
Ms. Cynthia Edgar Gitt, Esquiress
John Mann, Esquire
David Rubin, Esquire